No. [redacted] 198

IN THE

Supreme Court of the United States,

OCTOBER TERM—1925.

JOSEPH SEEMAN, SIGEL W. SEEMAN, SYLVAN L. STIX, CARL SEEMAN and FREDERICK SEEMAN, copartners, doing business under the firm name and style of Seeman Brothers,

Petitioners,

—against—

PHILADELPHIA WAREHOUSE CO.,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

COHEN, COLE & WEISS,
Attorneys for Petitioners,
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New York City.

SAMUEL F. FRANK,
Of Counsel.

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Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Joseph Seeman, Sigel W. Seeman, Sylvan L. Stix, Carl Seeman and Frederick Seeman, respectfully represent as follows:

1. That on April 12, 1921, the respondent commenced an action against your petitioners at Common Law, in the United States District Court for the Southern District of New York , for the recovery of damages alleged to have been caused by conversion of certain canned salmon in the sum of Eight thousand ($8,000) Dollars, with interest and costs.

Your petitioners answered that respondent's alleged title to the salmon was based upon an alleged pledge as security for a usurious loan to one Coccaro, which loan was void under the laws of the State of New York, where it occurred; and that said statute provided that such a transaction was entirely void and unenforcible.

2. Said action was duly tried before Hon. Julian Mack, Circuit Judge, and a jury, for six days, and, during the trial evidence as to the real nature of the transaction was heard at length. On November 14th, 1923, the jury rendered a verdict in favor of the defendants, your petitioners, upon which a verdict was entered and on December 28th, 1923 a motion to set aside the verdict and for a new trial was denied by Judge Mack.

3. Respondent sued out a Writ of Error to the United States Circuit Court of Appeals for the Second Circuit, which on May 11th, 1925, filed an opinion directing that the verdict of the jury, the judgment entered thereon, and the order denying the motion for a new trial, be reversed—concluding in the following language:

> "*The only defense urged below is that of usury. We hold that the transaction was not usurious* and judgment should have been entered for the plaintiff in error.
>
> Judgment reversed."

4. Respondent taxed costs amounting to $761.70 and an order directing the issuance of mandate accordingly was entered on May 18th, 1925.

5. Your petitioners further represent that no appeal lies as of right by writ of error, petition for review or

otherwise, from said order of the Circuit Court of Appeals, and the said order was, therefore, final against your petitioners.

6. Your petitioners believe that the said opinion and order of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Acts of Congress in such cases made and provided.

7. Your petitioners further represent that, not only is the amount directly involved in this action considerable, but a number of other actions are now pending involving claims arising from said Coccaro bankruptcy in which the essential issue is that of usury passed upon in the present case; and that such other actions await the determination of the present case, which was considered in the nature of a test case on the questions herein involved. Such actions, so far as your petitioners are informed, are as follows:

IN THE UNITED STATES COURT—SOUTHERN DISTRICT NEW YORK.

Philadelphia Warehouse Company v. *Henry Christie* for $10,000;

Philadelphia Warehouse Company v. *Habicht Braun & Co.* for $5,000;

Philadelphia Warehouse Company v. *W. A. Camp & Co.* for $8,500.

IN THE NEW YORK SUPREME COURT—NEW YORK COUNTY.

Royal Bank of Canada v. *Hills Brothers Co.* $7,965.50;

Philadelphia Warehouse Co. v. *Francis H. Leggett* for $2,500.

IN THE CITY COURT OF THE CITY OF NEW YORK.

Philadelphia Warehouse Co. v. *Elwood J. Dixon* for $1,750.

8. That the public interest will be promoted by a prompt settlement in this court of the questions involved, and trials and appeals of the various actions referred to will be thereby avoided.

9. Your petitioners further show that the Circuit Court of Appeals, reversing the verdict of the jury, and the order of Judge Mack, held as a matter of fact that the transaction involved was not a usurious one; that its ruling as to interpretation of the usury statutes of the State of New York, is in direct conflict with the interpretation placed thereon by the Appellate Division of the Supreme Court of the State of New York, in the case of *Hoolcy* v. *Talcott,* 129 Appellate Division 233, which was cited in petitioners' brief and relied upon by petitioners at the trial, but which is in no way referred to in the opinion of said Circuit Court of Appeals. The said opinion, moreover, your petitioners submit, is in violation of Section 1011 of the Federal Judicial Code, in that in effect it reverses the findings of a jury as sustained by the trial Court upon a question of fact, although said opinion purports to hold that there was no evidence justifying the jury's verdict.

10. In order to point out the nature of the issue and facts involved in the case, the same may be briefly summarized as follows:

Your petitioners, merchants in business for over thirty-five years, purchased certain canned salmon concededly in good faith (fol. 706), in the open market in New York City from one Coccaro. More than a year later, respondent commenced this suit against petitioners, claiming that these goods had been pledged with it by Coccaro for a "loan of credit"; that Coccaro had improperly withdrawn the goods from the warehouse, and that petitioners' purchase thereof (though in good faith and for value) thus constituted a conversion.

Upon the trial it appeared that respondent had a standing advertisement in the New York Journal of Commerce in the following form:

TIME LOANS ON MDSE.
in any responsible warehouse
at ¼% per month over lowest rate
for best commercial paper
No rehypothecation of notes or mdse.
No deposit balance to be maintained.
Interest allowed on prepayments for
releases of mdse.
Philadelphia Warehouse Company
3rd & Chestnut Sts., Phila.
Capital $1,000,000 Surplus $1,000,000
Established 1873.

The opinion of the Circuit Court begins by describing respondent as a Pennsylvania corporation "doing a warehouse business," though the record clearly discloses that it never owned or operated *any* warehouse *anywhere*

(fols. 424-425); but that its business was really making such "time loans on mdse." This opening misconception of the Circuit Court of Appeals is followed by its erroneous conclusion that respondent has discovered an unbeatable plan for evading the usury statute by the ingenious use of printed forms calling what it described in its advertisement as *"Time Loans on Mdse."* loans of its credit.

The evidence disclosed that respondent's secretary, Cosgrove, came to New York and in New York made arrangements, as the result of which Coccaro got the money against a so-called pledge of his canned goods then in warehouse. The testimony of respondent's secretary on the point is as follows:

> "Q. So then I am correct in stating that each one of those transactions that are stated in this Bill of Particulars of yours *you came to New York City and made the arrangements with Coccaro, told him that the deal was closed if you satisfied yourselves as to the* value of the goods, and when you had satisfied yourselves as to the value of the *goods then the deal was closed so* far as the arrangement between you and Coccaro was concerned? A. So far as the agreement to do what we undertook to do was concerned."

Respondent's called as a witness one McAndrew, an employee of Coccaro, who testified: that he negotiated with Cosgrove as follows (fol. 726):

> "A. I asked Mr. Cosgrove if he would be interested in making a loan on some foodstuffs that we had in a warehouse. As near as I can recall the exact conversation at that time, he told

me that, as a general rule, they liked to loan their money on raw materials, but we discussed the matter, and he said the probabilities were that he would make the loan as it was more or less of a staple line."

Folio 728:

"A. He told me that it would cost me one-quarter, one-half, and one per cent. I asked him did he mean a quarter of one per cent. per annum, or per month, so he told me per month, so I asked him why he did not tell me the exact figure. He said, 'Well, it is the method that we apply in our payments.' He said, 'We get one-quarter of one per cent. for our commissions.' He said, 'We pay one-half or thereabouts, or whatever the money costs us,' and he said, 'The one per cent. you pay to A. U. Surprenant & Company.' I asked him why I should pay A. U. Surprenant & Company, and he told me that was the only way he could do business with me, would be through A. U. Surprenant & Company. I then told him that my reason for telephoning to him and getting in touch with him was to avoid paying A. U. Surprenant & Company; that I knew that Coccaro in previous transactions made his loans through A. U. Surprenant & Company, and it was my duty, or rather my work at the time with Coccaro to try to obtain these loans as cheap as possible. Well I said, 'All right, because I have been instructed to get the money."

Folio 733:

"Q. At any rate, did Mr. Cosgrove on the second occasion you saw him, produce any printed

papers? A. He had this form with him and I know there were two or three signatures required * * *"

Folio 735:

"A. I gave them to Mr. Coccaro and he signed them."

Folio 737:

"Q. Was there anything said at that time or immediately prior to that time that those papers were signed, about the signature or about the contents? A. I looked over the papers.

Q. Tell us what you said, as nearly as you can remember the words. A. As near as I can remember it, I asked Mr. Cosgrove what was the idea of all those papers and he told me that this was a form that was given to them by their attorneys and the reason for doing it was to comply with the law."

Thus, in addition to interest upon the advances or loans (which current interest above was in most instances in excess of 6%), Coccaro was required to pay an additional sum of 3% per year to respondent *for making the loan,* besides brokerage fees for discounting its paper. Coccaro was likewise required to pay excessive commissions to one Surprenant who represented respondent as broker, thus bringing up the total rate paid by the borrower to from 20% to 23% i. e. current interest 5½ to 7%, respondent's commissions 3; brokerage to Lewis 1½; Surprenant 12. Even assuming that Surprenant's charge is not attributable to respondent the latter required the borrower to pay from 10% to 12% per annum.

There was much other testimony to show usury. The question as to whether it existed or not was left to the

jury by Mack, *J.*, in a careful charge (fol. 989) and the jury found in favor of petitioners.

Upon all of this record, the Circuit Court of Appeals in its opinion says—nevertheless:

> "We see nothing in evidence which raised an issue of fact that this transaction was otherwise than is claimed by the plaintiff-in-error * * * below there was a failure to distinguish between a loan of money and a loan of credit,"

and also:

> "We hold that this transaction is not usurious."

The Circuit Court of Appeals in reaching this conclusion held empirically, that the transaction in question was a loan or sale of plaintiff's credit because it issued its *note* rather than its *check* to the borrower. In this connection the Court said:

> "The plaintiff-in-error's contract and methods of transacting its business has met with the approval of the highest Court of Pennsylvania. *Righter & Sowgill* v. *Philadelphia Warehouse Co.*, 99 Penn., St. 289."

The case referred to is erroneously cited by the Court, the correct title being *Righter & Cowgill* v. *Philadelphia Warehouse Co.*, 99 Penn. St., 289. In fact it did not hold any such proposition as will appear from a reading thereof.

Respondent's "method of business" was to issue its own note to a note broker, S. B. Lewis & Co. of Philadelphia—selected by it and till then unknown to the borrower. Lewis discounted the note and turned the proceeds over to the borrower—an evidently transparent scheme.

No case in this court is cited in the opinion holding that a Court will distinguish a transaction as a loan of credit rather than a loan of money, as matter of law; or that any Court has approved any business firm's "contracts and methods of transacting business" to such an extent that they may be used under any circumstances without being subject to the usury statutes.

The cases cited in the opinion are decisions of the lower Federal Courts, not in point on the issue involved, but the authorities which we have collected in our brief point out that the "loan of credit" theory has furnished so convenient a device to avoid the usury statute, and is so subject to abuse and consequent suspicion, that it is always a question of fact for the jury whether it was not a mere cover for usury. The opinion of the Circuit Court of Appeals thus lays down a new rule of law, contrary to all other decisions by holding that the form of a transaction governs as a matter of law, rather than the actual intended fact.

Incidentally, the opinion of the Circuit Court of Appeals (though founded directly upon the conclusion that the transaction was a loan of credit and therefore not usurious), suggests that the transaction was governed by the Pennsylvania statute and not by the New York statute, because Coccaro, the borrower, had to repay the amount of the loan to the respondent at its office in Philadelphia, although the "deal was closed" (Record, fol. 409) in New York City, where respondent advertised for the making of "Time Loans on Merchandise," and where its secretary came to arrange the transaction with Coccaro.

Petitioners represent that, although this suggestion of the Court is merely incidental, it is likewise erroneous, and that a transaction cannot be saved from the operation

of the usury statute merely be making repayment of money in another state.

Petitioners claim that the verdict of the jury was amply justified by the evidence; that the Trial Court correctly charged the law and that peitioners have been deprived of their Constitutional right to have questions of fact passed on by a jury by the action of the Circuit Court of Appeals.

Your petitioners respectfully represent that the alleged principles upon which the decision is based are erroneous, subversive of commercial usage and legal precedent, and amount in effect to a judicial annulment of the usury statute.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals, for the Second Circuit, to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, and to the end that the same may be reviewed and determined by this Court in conformity with the provisions of the Act of Congress in such case made and provided; and that your petitioners may have such other and further relief in the premises as to this Court may seem appropriate, and in conformity with the said Acts, and that said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

And your petitioners will ever pray.

SEEMAN BROTHERS,
By SIGEL W. SEEMAN,
a member of said firm.

State of New York,
County of New York—ss.:

SIGEL W. SEEMAN, being duly sworn, deposes and says that he is one of the petitioners in the foregoing petition: that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

SIGEL W. SEEMAN.

Sworn to before me this
13th day of August, 1925.

SAUL ADELMAN,
Notary Public,
New York County.

I hereby certify that I have examined the above named petition, and that the allegations of fact contained therein are true, and that said petition is in my opinion well founded in point of law, and that the case is one in which the prayer of the petition should, in my belief, be granted by this Honorable Court.

SAMUEL F. FRANK,
Counsel for Petitioners.

No. 6 198

IN THE

Supreme Court of the United States,

OCTOBER TERM—1925.

JOSEPH SEEMAN, *et al.*,

Petitioners,

—against—

PHILADELPHIA WAREHOUSE CO.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX.

TABLE OF CASES CITED:

Table of Cases Cited—(cont'd).

AUTHORITIES CITED:

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—against—

PHILADELPHIA WAREHOUSE CO.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

Petitioners ask this Court to review a judgment of the Circuit Court of Appeals for the Second Circuit, reversing a judgment in favor of defendants—your petitioners—which was entered upon the verdict of a jury after a trial before Circuit Judge Julian W. Mack.

The opinion of the Circuit Court of Appeals concludes by saying (MANTON, *J.*, writing):

> "The only defense urged below is that of usury. We hold that this transaction was not usurious and judgment should have been directed for the plaintiff-in-error."

Therefore, it will be seen that the ruling complained of practically disposes of the case unless a review is granted by this Court.

Petitioners urge upon this Court that a review is particularly necessary in the present case for the following reasons:

1. That numerous other actions—now awaiting trial—for which the present one was a test case—are dependent upon the outcome of this appeal.

2. That the decision of the Circuit Court of Appeals introduces a novel and dangerous doctrine, in that

(a) It interprets the usury statute of the State of New York in a manner directly contrary to the interpretation thereof by the courts of that state; and of the decisions of this Court, notably *Andrews* v. *Pond*, 38 U. S. (13 Peters) 65.

(b) It declares, as matter of law, that certain transactions which the jury found to be *in fact usurious*—were not usurious—in violation of Section 1011 of the Revised Statutes (Compiled Statutes §1672); and, in effect, annuls the usury statute of the State of New York.

The Facts.

Petitioners, under the name of Seeman Brothers, have for many years been engaged in the wholesale grocery business in New York City (fol. 701).

On February 17, 1920, they saw an advertisement in the New York "Journal of Commerce," offering for

sale some 1000 cases of salmon (fol. 705) which it appears, was the same lot of salmon to which respondent claims title in this action. Petitioners bought the salmon from A. J. Coccaro and paid for it in full (fol. 707), concededly without knowledge of the alleged rights of respondent and in entire good faith (fol. 706).

More than a year after this purchase and payment by petitioners, respondent for the first time (on March 11th, 1921), made claim upon petitioners for the 999 cans of salmon or its value.

Respondent claimed title to the salmon by virtue of a "pledge contract" (fols. 1057 to 1068) of the goods in question executed to it by one Coccaro simultaneously with his obtaining loans from it against such merchandise, which respondent offered to make in the following advertisement:

TIME LOANS ON MDSE.
in any responsible warehouse
at ¼% per month over lowest rate
for best commercial paper
No rehypothecation of notes or mdse.
No deposit balance to be maintained.
Interest allowed on prepayments for
releases of mdse.
Philadelphia Warehouse Company
3rd & Chestnut Sts., Phila.
Capital $1,000,000 Surplus $1,000,000
Established 1873.

Respondent issued its own note to a note-broker, who caused it to be discounted and transmitted the proceeds of such note to Coccaro. This note-broker, S. B. Lewis & Co., also of Philadelphia was previously unknown to Coccaro, was designated by respondent, which required

Coccaro to sign a printed authorization designating Lewis as his representative for such purposes (fol. 425).

Respondent contended that this procedure constituted a "loan of credit" rather than a loan of money, and did not, therefore, come within the purview of the usury law; through the rates paid by Coccaro exceeded the legal rate of 6% per annum, to-wit, a fixed rate of 3% to respondent, plus the current interest rate, varying from 5½% to 7%, plus brokerage and other charges.

Petitioners claimed that there was a clear case of a usurious loan, only transparently covered by respondent's device of issuing its *note* instead of its *check*, and that, therefore, the transaction was void as to Coccaro, and consequently, as to petitioners whose title was derived from him.

In our brief below, we summarized our contention as follows:

> "Whether plaintiff's astute attorneys have devised a method of lending money which will protect it from the usury statute or not, no amount of explanation can gloss over the fact that—for all practical purposes—it *is* lending money without supervision or protection of the banking law in any state.
>
> We cannot resist the conclusion expressed in *Knickerbocker Life Ins. Co.* v. *Nelson,* 78 N. Y. 149:
>
> > 'It has been said and reiterated by the courts, from the time the schemes and contrivances of lenders became the subject of judicial examination, that there is no contrivance whatever by which a man can cover usury (*Jeston*

> v. *Brooke,* 2 Cowp. 793), and that no subterfuge shall be permitted to conceal it from the law (*DeWolf* v. *Johnson,* 10 Wheat. 285), yet *if this agreement can stand it will require no wit or subtilty to circumvent the statute'.*"

Nevertheless, the Circuit Court says in its opinion here,—

> "The business of plaintiff-in-error for fully half a century had been to loan its credit by *delivering its promissory note to a merchant* who pledged with it merchandise to insure payment of the merchant's note at maturity. The pledgor received a note which could readily be turned into cash by its sale through note brokers, through various banks throughout the country. * * * *The charge for issuing its promissory note* against the pledge of the merchandise in a public warehouse *was three per cent. per annum* upon the face amount of its notes so issued. * * *
>
> *The three per cent. per annum paid to the plaintiff-in-error upon the face of the note was to cover its services for advancing their credit;* that is, issuing the notes and for such other services in connection with the security as might be necessary. *Six* per cent. was a lawful rate of interest; *the compensation paid to the plaintiff-in-error was a return for the issuance of its note, for its obligation to pay and the chances of reimbursement from the borrower.* We see nothing in the evidence which raised an issue of fact that the transaction was otherwise than as claimed by the plaintiff-in-error." (Italics ours.)

The foregoing statement of the Court really begs the question. It assumes that, *merely* because respondent made its own promissory *note* (whether discounted

by itself (fols. 372-373) or by note brokers used by it regularly) the transaction was a "loan of credit," though admittedly, if it had issued its check instead, it would have been a loan of money. Whether it was really a "loan of credit," or simply a device to give a different name to an ordinary usurious loan, was to be determined, from a decision as to

(1) whether the mere issuance of a note, even in good faith, would *ipso facto* be a "loan of credit," and

(2) whether, from all the dealings between the parties such good faith appeared—or whether the form of the transaction was a mere subterfuge. This latter issue was to be determined from all the facts and circumstances in the case; not from an assumption based on the mere form of papers prepared by respondent, in disregard of the testimony showing the actualities of the transaction.

POINT I.

The holding of the Circuit Court of Appeals that, as matter of law, respondent did not violate the New York Usury Statute, because it issued to the borrower or to its own bank its *note* instead of its *check* amounts to a judicial repeal of the New York Usury Statute; and in view of the finding of the jury, sustained by the trial Judge, that the transaction was *in fact* a usurious loan, exceeds its jurisdiction as limited by Section 1011 of the Revised Statutes.

The record makes it perfectly evident that respondent is a money-lending institution. The opinion of the

Court of Appeals describes it as "a corporation doing a warehouse business" in Pennsylvania—*an evident error*, as the record shows *it has no warehouse and never operated one anywhere* (fols. 424-425), nor is it licensed to do business under the banking laws of either New York or Pennsylvania. Whatever forms or methods it has invented, cannot conceal the fact that it was doing what it advertised to do, *i. e.*, making "Time loans on merchandise," (Ex. H, fol. 1339).

At best it is difficult to draw a distinction (if there be any) between the legal or logical effect of respondent's carrying out its arrangement with the borrower—Coccaro—by sending him its own *check*, drawn upon its own bank (which would be a loan) or providing the funds for the same purpose by discounting (or having a broker discount) its own note so that the proceeds reached the borrower (which it called a "loan of credit"). In this case Coccaro issued no notes. Respondent neither endorsed nor guaranteed any notes for him, but got money to him by discount of its own notes. Thus the asserted distinction between lending its credit and lending money to Coccaro reaches the verge of disappearance.

Indeed, respondent never even gave its notes to the borrower, Coccaro, but sometimes direct to its own bank and in other cases to S. B. Lewis & Company, note brokers selected by respondent itself (fols. 419-420). These brokers handled transactions amounting to millions of dollars, and respondent used printed forms as part of a regular routine, purporting to have the borrower name S. B. Lewis & Co. as agents of the borrower to discount respondent's note (fol. 425). *So transparent and creaking a device did not fool the business*

men on the jury; but its significance evidently escaped the attention of the Court below.

The opinion below cites no case in this Court which has sustained a distinction so purely arbitrary and formal, *i. e.*, that issuing a *note* instead of a *check,* in the first instance, can save what is in effect a usurious loan from the consequences of such a transaction.

The Circuit Court cites three cases in support of its assumption that a "loan of credit" justifies any charge or rate of interest. Two of these cases in the lower Federal courts illustrate the difference between where there were real "loans of credit" and the Court's assumption that there was a loan of credit in the present case, merely because *notes* were issued instead of *checks.*

In *Ryttenberg* v. *Schefer,* 131 F. R. 313, decided in the District Court, a commission house, acted as factor, for a business house.

Holt, *J.,* said:

> "Schefer, Schramm & Vogel guaranteed the consignments, and permitted Radon & Co. to have the benefit of the name and credit of their house under the arrangement made. The contract was a genuine business arrangement, of mutual advantage to both parties, and not a mere cloak to cover usury."

Title Guarantee & Surety Co. v. *Klein,* 178 F. R. 689, was decided in the Circuit Court of Appeals, Third Circuit.

An obligation for the payment of money, (*i. e., not the lender's own note,* but United States Government 3%

bonds) were sold, with an agreement to redeliver. The Court said:

> "The United States bonds that were the subject of this loan * * * were subject to fluctuation and for that reason among others were not to be regarded as a loan of money."

The theory on which that transaction was sustained is inapplicable to the case at bar; for there could be no "fluctuation" in the value of respondent's own note. * * * At maturity, it had to be paid in full, and respondent would then be in the same situation whether it "loaned" or delivered to a borrower, in the first instance, its note, its check or its cash.

In *Meeker* v. *Fiero,* 145 N. Y. 165, a loan had long since been made with a mortgage for security. The borrower desired the lender to surrender the security and take another security in place for it, and the Court held that this was

> "simply a change of security for an existing debt and that S—— could lawfully demand compensation for assenting to the transaction."

None of these cases on the facts, or by analogy of reasoning justifies the conclusion of the Circuit Court that a similar "loan of credit" existed in the case at bar. In each of the cases cited none of the parties had in view or contracted to get or borrow money through any means or by any plan. In the case at bar, no matter how respondent sought to conceal it, the sole aim in view was for the borrower, Coccaro, to get a loan of money on his merchandise. The machinery by which

respondent obtained the money to make that loan (whether by issuing its note and discounting it itself or by having it sold by a broker or by drawing its check) was of no interest to the borrower, but simply the concern of respondent as to where and how it could get the money in accordance with its agreement to make "time loans on merchandise."

We submit that it is equally plain in the case at bar that when respondent issued its *notes* to the end that Coccaro should get the proceeds, it was as much a loan, as if it issued its *checks* directly to him.

This Court has never approved so unreal a distinction as that drawn by the Circuit Court of Appeals; and the authorities in point illustrate that—if the "loan of credit" theory can be sustained at all in a case like this—it can only be sustained when the jury is convinced that the transaction was not really intended as a loan.

> "But if the transaction is in fact a loan or forbearance, the lender cannot, by giving to it the form of a sale or credit, prevent it from falling within the prohibition of the usury statutes; and it has been said *that transactions in the form of a sale of credit are to be viewed with great jealousy, as they are extremely liable to be perverted to usurious purposes.* After a person has accepted a bill or indorsed a note for another, his subsequent payment of such bill or note is a loan or advance, and he cannot, in addition to the maximum rate of interest on the money so loaned or advanced, charge a compensation for such loan or advance without rendering the transaction usurious."
>
> 29 American English Encyclopedia Law, 472,

citing *Beckwith* v. *The Windsor Manufacturing Co.*, 14 Conn., 605, where the Court says:

> "The question whether the transaction was fair, and *bona fide*, or a cover for usury was submitted to the jury, and they have found in favor of the validity of the transaction, judgment was rendered accordingly—page 606.
>
> Should it be said that great danger may be apprehended from the perversion of such contracts to usurious purposes, the answer is, that whenever they are so perverted, they will be void. The intent of the parties in making the contract must govern; and that is a question of fact, to be determined by that tribunal whose business it is to pass upon such matter; and if an usurious intent is found, it will vitiate the contract."

In *Carstairs* v. *Stein*, 4 Maule & S. 192 (105 Eng. Reprint, 805), Lord Ellenborough aptly remarked:

> "Commission cannot be added to the amount of legal interest for the purpose of inducing a loan of money to be made and of recompensing it afterward, when made. All commission, where a loan of money exists, must be ascribed to and considered as an excess beyond legal interest, unless as far as it is ascribable to trouble and expense, *bona fide* incurred, in the course of the business transacted by the persons to whom such commission is paid * * *
>
> These circumstances certainly laid a foundation for suspecting that the high rate of commission contracted for was a colour for usury upon loans which were stipulated not to be required but were in fact required, and made from the beginning to the end of this business.

> *But the question, i. e., whether colour or not, was a question for the consideration of the jury* * * * The jury having drawn a different conclusion, and which conclusion, upon the view they might entertain of the facts, they were at liberty to draw, and they having done so, we do not feel ourselves, as a Court of Law, but acting according to the rules by which Courts of Law are usually governed in similar cases, at liberty to set aside that verdict and grant a new trial."

The opinion just cited shows the inapplicability of the case upon which the opinion of the Circuit Court of Appeals seems entirely founded.

In that case (*Righter & Cowgill* v. *Philadelphia Warehouse Co.*, 99 Penna. State, 289) the Pennsylvania Court held *on the record there before it* that the 3% charged by respondent represented actual services performed in the care of collateral which services were testified to by witnesses (see Opinion, 99 Pa. State, top of 294), and that there was no evidence at all of any other agreement than the papers offered by the respondent (see p. 294).

The record in the instant case, however, showed that no expenses were incurred by respondent for the care of collateral (fols. 494-498), and that the 3% was really for additional compensation over and above 6% for loaning out money.

As said in *Hooley* v. *Talcott*, 129 App. Div. 233, by the New York Appellate Division:

> "In all these transactions Talcott was acting as a money lender solely * * * There were

> no dealings between Talcott and Scherr pursuant to which any moneys became due from Scherr to Talcott other than these loans made pursuant to the general arrangement between Bush, Scherr's agent, and Talcott. The net result of these transactions was that Talcott received amounts aggregating something over 9% to something over 12% per annum, the interest and commissions in all cases being paid in advance * * * *It appears that the alleged commissions were a fixed percentage of one-quarter or one-half per cent., a month for the amount loaned either deducted from the amount loaned or paid in advance, and regardless of whether there were any appraisals or substitution."*

This New York case—completely ignored by the Court below—although stressed in our brief and relied on by the Trial Judge (fol. 971) as a controlling authority, indicates the inapplicability of the *Cowgill* case to the facts in this record; for here also, as in *Hooley* v. *Talcott,* the "fixed commission" of 3% was payable regardless of, and not as compensation for, any actual care of collateral or other services, not rendered, nor ever intended to be.

Section 1011 of the Revised Statutes (Compiled Statutes Sec. 1672) reads:

> "Reversals on Error Limited. There shall be no reversal in the Supreme Court or in a Circuit Court of Appeals upon a writ of error, for error in ruling any plea in abatement, other than a plea of jurisdiction of the court, *or for any error in fact."*

There is no different rule of law as to the weight of evidence to be applied to the issue of usury than that concerning evidence in any other civil action.

29 Eng. & Am. Encyl. of law, page 542, notes 9 and 13.

In *Kurtz* v. *Doerr*, 180 N. Y. 88, the New York Court of Appeals said:

> "We deem it very important that the strict rule of evidence, applicable to the burden of proof in criminal cases, should not be extended to civil action for the recovery of damages, where the defendant is charged incidentally, with arson, embezzlement or any other crime."

This Court in the leading case of *Andrews* v. *Pond*, 13 Peters 65, at page 76, said:

> "But although the transaction, as exhibited in the accounts, appears on the face of it to have been free from the taint of usury, yet, if the ten per cent., charged as exchange, or any part of it, was intended as a cover for usurious interest, the form in which it was done, and the name under which it was taken, will not protect the bill from the consequences of usurious agreements; and if the fact be established, it must be dealt with in the same manner as if the usury was expressly contracted for in the bill itself. But whether this item was intended as a cover for usury or not, is a question exclusively for the jury."

This is precisely contrary to the decision of the Circuit Court of Appeals herein, and was not considered in its opinion.

Unless the assumption of the Circuit Court of Appeals is correct, that merely because respondent issued its note instead of its check to a person seeking to obtain "TIME LOANS ON MERCHANDISE" the transaction is conclusively stamped a loan of credit—all the circumstances in the transaction were to be considered by the jury and by them *exclusively* under the decision of this Court just cited.

Without repeating the testimony at length we may recall the attention of the Court to respondent's advertisement, offering "Time Loans on Merchandise" which is the beginning of the transaction, to the admissions of plaintiff's own secretary, Cosgrove, who came to New York to interview the borrower, Coccaro.

(Fol. 498, fol. 307, fol. 501, fol. 406, fol. 407, fol. 408, fol. 409, fol. 412, fol. 425, fol. 428); and to the testimony of Coccaro's employee, McAndrew, corroborated by the records of the business and the inferences from Cosgrove's admissions and half-truths (fols. 726, 728, 733, 735, 737).

We submit that this testimony, beginning with Cosgrove's admission (fol. 498):

> "Q. When you spoke to Coccaro he wanted to borrow money, did he not? A. As far as I can recall, yes.
>
> Q. *And he applied to you for a loan of money, did he not*? A. *He did.*"

shows that Coccaro got from respondent what he wanted, a loan of money, despite the fact that Cosgrove recited to the borrower a "set form of words" which respondent employed in all such transactions (fol. 501) by using papers prepared by respondent's attorney to comply with the law (fol. 737); and that there was a distinct agreement (fols. 728-9-30) for the lending and borrowing of money at rates in excess of those allowed by the usury statutes of the State of New York.

We submit that disregard of this testimony and of the jury's findings, that in fact a loan of money was made and intended, is in violation of the statute quoted, especially where there is nothing to the contrary but the assumption of the Court below, that because respondent issued its *notes* in the first instance instead of its *checks,* the transaction must necessarily be regarded as a "loan of credit."

POINT II.

The question of the Conflict of Law was to be resolved by the Usury Law of the State of New York where the transaction took place.

Although the Court below founded its opinion squarely on the fact that the transaction was not usurious, it suggested incidentally that it was governed by the Pennsylvania statutes, which do not forfeit the principal and not by the New York statutes, which do.

This conclusion the Court based upon its assertion that the form used by respondent required the borrower

to repay the money to it in Philadelphia and that the contract was not complete until respondent delivered its notes to the note-broker Lewis in Philadelphia.

The following facts summarize what was done in New York in this case:

1. Respondent advertised in the New York Journal of Commerce offering merchants in New York "time loans on merchandise" (Exhibit H, fol. 1339);

2. Respondent was doing business in New York with merchants other than Coccaro (fols. 417, 471, 894);

3. Cosgrove, respondent's secretary, usually came to New York to transact such business for it (fols. 405, 894);

4. Cosgrove, was *authorized to*, and did, arrange for and *complete* transactions with respondent's customers in New York (fols. 402, 417);

5. Cosgrove met Coccaro (or McAndrews, his confidential man) in New York for the purpose of discussing arrangements by which Coccaro could get money (fol. 405);

6. Cosgrove admitted that in New York Coccaro squarely asked him for a loan of money fols. 498-501) for which he was willing to give merchandise in the warehouse as collateral (fol. 501) in New York;

7. Cosgrove in New York stated to Coccaro the terms of the transaction, the rate at which plaintiff would advance the money, to wit: ¼, ½ and 1% and that it would not make the loan

except through Surprenant and upon payment of a "commission" to the latter (See McAndrew, fols. 728-730);

8. That in New York respondent's printed forms of "pledge contract" and the ostensible request to the note-brokers to sell the notes, were signed by Coccaro (fol. 426) and delivered to Cosgrove (fols. 412 and 440);

9. That at the same time bill of lading for the merchandise was delivered as collateral to Cosgrove in New York (fol. 961);

10. That checks for ¼ of 1% plus stamp tax were then delivered to Cosgrove in New York (fol. 428);

11. That it was then arranged in New York that respondent would advance moneys to Coccaro provided an investigation showed that Coccaro's representation as to the value of the security was substantiated (fol. 307);

12. That such investigation as to the valuation of the merchandise was made by Cosgrove himself in New York (fol. 408); before he returned to Philadelphia (fol. 308);

13. That the net proceeds of the notes obtained on respondent's notes were transmitted to the Irving National Bank in New York with instructions to deposit the same to the account of Coccaro, pursuant to an agreement to that effect (fol. 430);

14. That respondent maintained an account in the Chase National Bank in New York (fol. 461) and that payments by Coccaro on account

of respondent's advances were made by depositing the same in its said account in that bank in New York (fols. 461, 466-467, 510, 537).

This identical situation was considered in *Hooley* v. *Talcott* (*supra*).

In that case, Talcott made arrangements with Bush, the New York agent of a Philadelphia merchant named Scherr. The arrangement was that Scherr was to obtain moneys from Talcott and pay him therefor 6% interest and a commission of from one-quarter to one-half per cent. per month (See Opinion, p. 234). This arrangement was made in New York City. The method of making these loans was in every instance substantially the same. Scherr signed and endorsed blank notes and sent them to Bush in New York. Bush filled them in, *dated them at Philadelphia, payable to Scherr at a bank in Philadelphia,* and then delivered them to Talcott. Talcott thereupon gave his check to Scherr, either for the full amount of the loan or for the amount of the loan less intere and commissions. As security for these loans, silk belonging to Scherr stored in a warehouse in New York, was turned over to Talcott as collateral security.

The Court in summarizing the facts said:

> "The application for the loan was made by the borrower's agent to the defendant in the city of New York; the agreement entered into upon such request was made in the city of New York; the notes, though made payable, for the convenience of the borrower, at a bank in Philadelphia, were delivered to the defendant by the

borrower's agent in the City of New York; the interest and the so-called commission was paid to the defendant in the City of New York; the money loaned was in possession of the defendant in the City of New York, and although the checks representing the same were sent to the borrower in Philadelphia, those checks were paid by the money of the defendant in the City of New York, and the goods—the collateral security for the repayment of such loans, were actually stored in the City of New York. *It seems to me that upon the whole transaction there is no doubt that the agreement at bar was a New York contract. The contract was for the loan of money upon the security of warehoused merchandise. The minds of the parties upon that contract met in the City of New York, where the agreement to loan upon such security was made.*"

At page 240 the Court said:

"The rule deducible from all these cases is that the whole transaction will be looked into to ascertain where the real contract the meeting of the minds, simply evidenced by the instrument, took place. When that is ascertained neither the date of the instrument, where signed, or where payable, is controlling. In the cases cited the instruments though signed and made payable in New York, were held not to be New York contracts because the agreement which they evidenced took place elsewhere. The converse must be true. *As in the case at bar the agreement to loan money and to deposit goods as collateral security took place in New York the contract was a New York contract though*

the notes evidencing that transaction were signed and made payable in Pennsylvania."

This conclusion is sustained by other authorities.

Wayne County Savings Bank v. *Lowe,* 81 N. Y. at page 571.

In *Andrews* v. *Pond,* 38 U. S. (13 Peters) 65 this Court said:

"The defendants allege that the contract was not made with reference to the laws of either State, and was not intended to conform to either. That a rate of interest forbidden by the laws of New York, where the contract was made, was reserved on the debt actually due; and that it was concealed under the name of exchange, in order to evade the law. Now if this defence is true, and shall be so found by the jury, the question is not which law is to govern in executing the contract; but which is to decide the fate of security taken upon a usurious agreement which neither will execute? *Unquestionably, it must be the law of the State where the agreement was made, and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with a bona fide agreement made in one place to be executed in another.* In the last mentioned cases the agreements were permitted by the *lex loci contractus;* and will even be enforced there, if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases, the legal consequences of such an agreement must be decided by the law of the

> place where the contract was made. If void there it is void everywhere; and the cases referred to in Story's Conflict of Laws, 203, fully establish this doctrine."

In the present case, nevertheless, the Circuit Court of Appeals said that:

> "The loan did not have its inception in New York nor was it completed in New York. The transaction was carried out in Philadelphia. * * * The pledge agreement was drawn and dated in Philadelphia; the contract was a unilateral one and did not become binding in its terms until the plaintiff-in-error issued its note; that act was done in Philadelphia."

We submit that this conclusion is squarely contrary to the evidence above referred to, and to the decision in *Hooley* v. *Talcott* (*supra*).

For the purpose of having the testimony on that point clearly before the Court, we reprint it as follows:

Fol. 409:

> "Q. So, then, I am correct in stating that in each one of those transactions that are included in this bill of particulars of yours, you came to New York City, and made the arrangement with Coccaro, told him that the deal was closed if you satisfied yourselves as to the value of the goods, and when you had satisfied yourselves as to the value of the goods, then *the deal was closed so far as the arrangement between you and Coccaro was concerned?* A. *So far as the agreement to do what we undertook to do was concerned.*"

Folio 412:

> "Q. These papers that you gave to Coccaro were shown to Coccaro, and you had him sign, and he signed in your presence in New York? A. That is correct."

Folio 307:

> "A. I said that if the salmon were found by us to be substantiated as to the value set on it by him, from inquiry made *by me* in the trade *that day,* I would, upon my return to Philadelphia the *next day,* see that the note called for was issued."

Folio 407:

> "Q. In other words, when you left Coccaro's office that day *that was a deal that was closed?* A. No, I beg your pardon; subject to a satisfactory appraisal and examination of the collateral."

Folio 408:

> "Q. *You* did that likewise, did you? A. Yes, *I did.*"

We submit that this makes it perfectly clear that there was a final and binding agreement to loan money (or issue a note" as respondent contends) between the parties in New York, made between Cosgrove, plaintiff's Secretary, who was in full charge and authority in the matter, and Coccaro (fol. 402); the deal was closed. It was only subject to the same man's (Cosgrove) making a satisfactory appraisal of the collateral which he, Cosgrove, did in New York that day (fol. 437) *before returning to Philadelphia.*

CONCLUSION.

The opinion of the Circuit Court of Appeals, and its actual holding in the instant case, affects interests more diverse and a much larger number of citizens than the parties to the present case and the other cases now pending. We know of no other decision in which a Court of high authority has issued an open patent or approval to "the methods and contracts" of any money lending institution, such as the Circuit Court of Appeals does in the instant case.

The opinion, indicating as it does that the usury statutes can be circumvented by the simple device of having the lender issue a *note* instead of a *check*, is an open invitation to a growing business evil which has brought ruin and bankruptcy in its train.

Petitioners do not present the issue of the wisdom or propriety of the usury statutes. They are upon the statute books of the greatest commercial state in the Union, and, in conformity with them, business involving millions of dollars yearly is transacted.

These petitioners, reputable business men of many years standing, are not here trying to evade any agreement; but, as concededly innocent victims of a rule of law, which permits them to be held liable for conversion of goods, a year after they purchased it in the open market, through public advertisement in the usual New York newspapers, they point out that the claim on which they are sought to be held is based upon a transaction prohibited by statute. If that statute is drastic in its terms, the hardship imposed upon them by such rule of law is no less severe.

We respectfully submit to this Court, that the opinion of the Circuit Court of Appeals is not only erroneous and in conflict with the decisions of the New York Courts interpreting their own statutes, but is based upon an artificial and illogical distinction which is bound to cause confusion in the commercial world, and to lay the foundation for endless future litigation until it be authoritatively repudiated.

We submit that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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